No. 82-1363

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT R. SILVER, d/b/a
Allied Bond and Collection Agency

Petitioner

v.

BRIAN J. WOOLF, *In His Capacity as Acting Banking Commissioner of the State of Connecticut*

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, BRIAN J. WOOLF, IN HIS CAPACITY AS ACTING BANKING COMMISSIONER OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Whether §42-127a(a)(3) of the Connecticut General Statutes requiring out-of-state collection agencies which regularly collect from Connecticut debtors for out-of-state creditors to obtain a license is a *per se* violation of the Commerce Clause.

2. Whether the Connecticut license statute is within the permitted scope of the Federal Fair Debt Collection Practices Act provision allowing the states to pass stricter laws for the protection of debtors.

3. Whether summary judgment was properly granted where Petitioner alleged that multiple and inconsistent state laws would unduly burden interstate commerce but did not show that it was subject to any such laws.

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The Respondent, Brian J. Woolf, Banking Commissioner of the State of Connecticut, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. The opinions below are reported at 538 F.Supp. 881 (D. Conn. 1982) and 694 F.2d 8 (2nd Cir., 1982) and are printed in Petitioner's Appendix at pages 1A and 15A.

STATEMENT OF THE CASE

On the basis of the Commerce Clause, the Petitioner ("Allied") challenges §42-127a (a) (3), C.G.S., which requires an out-of-state consumer collection agency to obtain a license from the Respondent ("Commissioner") if it regularly collects from Connecticut consumer debtors on behalf of creditors whose place of business is located outside the state. Allied also sought to enjoin the Commissioner's application of the major enforcement mechanism of the State's regulatory scheme, §42-131a (b), C.G.S., which prohibits creditors from using unlicensed collection agencies.[1]

The dispute arose when, from July 1980 to January 1982, six complaints were filed by Connecticut consumer debtors with the State Banking Department regarding Allied's collection activities. The creditors in four of these complaints were major oil companies (Mobil, ARCO, and Shell), and the complaints involved the use of their credit cards in the state. The Banking Department investigated each complaint and, mindful of the requirements of the licensing statute, also sought to determine whether Allied "regularly" made collections from Connecticut consumer debtors. While Allied responded to the Department's questions regarding the specific complaints, it consistently refused to disclose the scope of its activities in Connecticut claiming that it was a national collection agency based in Pennsylvania, that it had no office or employees in Connecticut, and that it was not subject to regulation by Connecticut. Allied's recalcitrance eventually led to an administrative cease and desist order and a hearing to determine whether it required a license.

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[1]The referenced statutes are set out in full in Petitioner's Appendix, pp. 37A-48A.

At the State administrative hearing, Allied raised its constitutional challenge, but the hearing officer declined to rule on it. Allied then commenced its federal action to which the Commissioner filed a motion for summary judgment. The documents filed in support of the State's motion showed that from 1978 through 1981 Allied had 14,580 accounts (debtors) in the State of Connecticut rising from 921 in 1978 to 5,025 in 1981 and that, during that period, Allied collected $576,415.35 from Connecticut debtors. Further, countering Allied's bald assertions of oppressive regulation, the Commissioner showed that the requirements for a license are minimal, that no changes would be required in Allied's bookkeeping methods, and that Allied would only be required to produce its records if formal proceedings were commenced as the result of a complaint.

In the District Court Allied attempted to characterize itself as a purely interstate trader and claimed that the licensing statute barred its access to the state. Relying almost exclusively on this Court's decision in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), Allied argued that the requirement of a license was a *per se* violation of the Commerce Clause. The District Court (Blumenfeld, J.) easily distinguished *Allenberg* and found that Allied's regular contracts with Connecticut debtors, albeit by mail and telephone, which directly impact "the economic, psychological and social well being of numerous Connecticut citizens," (P.App., 25A), constituted substantial intrastate activities. The Court then considered the State regulatory scheme under the test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), finding it non-discriminatory and the burdens imposed by the scheme to be "minimal." (P.App., 30A).

In applying the *Pike* balancing test, the Court noted the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692,

et seq., and particularly 15 U.S.C. §1692n (P.App., 49A), which allows the states to pass stricter laws for the protection of debtors. While characterizing §1692n as a standard non-preemption clause, the Court considered it persuasive on the issue of the legitimacy of the State's interest in regulating. Finally, Allied claimed that the Court must consider the cumulative burden of multiple and inconsistent state licensing provisions. Since Allied did not show that it was subject to any such regulation, the Court gave little credence to this claim noting that the Commerce Clause protects interstate commerce not particular interstate firms. The Court then granted the motion for summary judgment.

On appeal Allied conceded that Connecticut's licensing statute was not burdensome. It continued to claim, however, that under *Allenberg Cotton Co. v. Pittman*, *supra*, the requirement of a license is a *per se* violation of the Commerce Clause and that "the prospect of multiple and probably inconsistent" multi-state regulation would be unduly burdensome. (P.App., 6A). The Circuit Court distinguished *Allenberg* on two grounds: (1) that Connecticut's comprehensive regulatory scheme and Allied's debt collection business are significantly different from the naked restriction on interstate commerce in *Allenberg*, and (2) that, unlike *Allenberg*, Congress had "affirmatively indicated that it considers the kind of state regulation at issue here to be desirable." (P.App., 7A-8A).

With regard to the "prospect" of "probably" inconsistent state regulation, the Court held that while the regulatory scheme is within the permitted scope of §1692n, authorizing state laws which afford greater protection to debtors, that section would not authorize state laws which in the aggregate would effectively prohibit the operation of interstate debt collection agencies. Since there was no evidence of any such

prohibitive state laws, however, the Court dismissed the claim holding that "Courts are not in the business of deciding such prospects." (P.App. 14A).

SUMMARY OF ARGUMENT

1. Requiring a consumer collection agency which has no offices or employees in Connecticut to obtain a license from the State is not a *per se* violation of the Commerce Clause where the agency regularly collects from Connecticut consumer debtors, where there is no claim that the licensing requirement is protectionist or unduly burdensome, and where Congress has provided that the states may pass stricter provisions for the protection of consumer debtors than provided by federal laws. Allied's claim that the Circuit Court's failure to find such a *per se* violation is in conflict with a line of decisions by this Court represented by *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), is without merit in that the facts of this case are distinctly different than the naked restriction on commerce in *Allenberg*.

2. The Circuit Court found that the state licensing statute is within the scope of the provision of the federal Fair Debt Collection Practices Act allowing the states to pass stricter laws for the protection of consumer debtors. Allied's argument that this ruling conflicts with this Court's decision in *New England Power Co. v. New Hampshire*, ——— U.S. ———, 102 S.Ct. 1096 (1982), is unsupported in that the federal statute here is broader than the mere "savings clause" in *New England Power*. Further, the state statute involved in *New England Power* was found to be protectionist and there is no such claim in the present case.

3. The Circuit Court correctly found that where Allied made no claim that it is subject to licensing in any other state, consideration of the possible burdens imposed by multi-state regulation is hypothetical.

4. The present case presents no issue requiring settlement by this Court where the case was decided under the principles set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); where Allied has made no claim that the Connecticut statute by itself causes it any harm; and where no national interest has been offended by the statute.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT OF APPEALS.

Allied's argument is limited to the claim that the Circuit Court's decision is in conflict with a line of cases represented by *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), and this Court's decision in *New England Power Co. v. New Hampshire*, ——— U.S. ———, 102 S.Ct. 1096 (1982). There is no claim that the decision conflicts with that of any other federal court of appeals.

1. No Conflict with *Allenberg Cotton Co. v. Pittman*

Allied continues to argue on the basis of *Allenberg* that the requirement of a license here is a *per se* violation of the Commerce Clause. Admittedly, some state actions may so clearly burden interstate commerce as to be "virtually" *per se* invalid, *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1977), but the mere fact of a license, by itself, has never been held to be such a *per se* violation. See *Robertson v. California*, 328 U.S. 440, 458-459 (1946). Allied's argument posits a wooden view of the negative implications of the Commerce Clause and ignores the facts which are of paramount importance in resolving such controversies. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 420-421 (1945).

Both lower Courts easily distinguished *Allenberg*. In that case this Court invalidated a Mississippi requirement barring a Tennessee cotton merchant from using the Mississippi courts to enforce a contract without obtaining a certificate of authority to do business there. The merchant had no offices or employees in Mississippi but contracted with farmers in that state for the future delivery of their crops with title

passing upon delivery to a local warehouse. Notwithstanding these contacts, the Court viewed the transaction as being within the "stream of commerce" and not sufficiently local to allow a state to bar access to its courts for the enforcement of contracts without qualifying to do business there. The major thrust of the Court's decision, however, was that if such contracts could not be enforced, it would totally disrupt the national commodity futures market.

The other cases on which Allied relies involve similar direct burdens on interstate commerce where little or no legitimate state interests were implicated. See, e.g., *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1887) [Tax on drummers for interstate sale of goods]; *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1924) [direct and burdensome regulation of interstate grain sales]; *Adams Express Co. v. New York*, 232 U.S. 14 (1914) [burdensome licensing scheme for common carriers engaged in interstate shipment of goods]; *Edgar v. Mite Corporation*, ——— U.S. ———, 102 S.Ct. 2629 (1982) [direct and burdensome regulation of interstate tender offers]; *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954) [state could not bar interstate carrier from state highways where to do so would conflict with federal Act].

The facts of the present case are distinctly different. Allied does not claim that Connecticut's statute discriminates against interstate commerce, is unduly burdensome, or that the state lacks a legitimate interest in protecting its consumer debtors. Further, unlike the cases it cites, Allied is not involved in a tender offer or the interstate sale or shipment of goods which involve quite different national interests than the regulation of consumer debt collection practices.

In addition, the Circuit Court identified a number of factors which distinguish Connecticut's license provision from the requirements challenged in *Allenberg* and other

cases on which Allied relies. First, Connecticut's license requirement for collection agencies is "an integral part of a precise regulatory scheme," which provides "an easy means of enforcing the substantive regulation of debt collection." (P.App., 8A). While Allied argues, on the basis of *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), that this is not a valid reason for sustaining the license statute where other remedies provided by the regulatory scheme (cease and desist order and injunction) are sufficient to allow the state to protect its consumer debtors, realistically, the out-of-state agency has little to fear from such actions. Only licensing ensures effective enforcement by prohibiting creditors, who usually have substantial contact with the state, from using unlicensed collection agencies. We also note that in addition to preventing abusive collection practices, licensing is designed to ensure that sums paid by debtors are properly accounted for (see §42-127a(b), C.G.S.; P.App., 39A). Licensing is thus central to the regulatory scheme aimed at protecting Connecticut's consumer debtors.

Next, the Circuit Court identified Allied's uniquely local contacts. The Court stated that "collection practices have long been viewed as a proper matter for regulation by the states," (P.App., 8A), in that while the means of communication used by the debt collector may be interstate, "the perceived abuses and consequent harm . . . are almost entirely localized." (P.App., 9A). In this regard the Court also noted that agencies like Allied are not trying to enforce their own contracts as in *Allenberg*, but generally they are trying to collect debts which were incurred locally and owed to companies which have significant contacts with the state. While Allied's debt collection business may indeed affect commerce, the nature of its business and its contacts with Connecticut distinguished it from the purely interstate trader it claims to be.

2. No Conflict with *New England Power Co. v. New Hampshire*

The Circuit Court also found that *Allenberg* was distinguishable on a second distinct ground; that is, the licensing scheme is within the permitted scope of 15 U.S.C. §1692n, which allows the states to afford greater protection to debtors than the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* In this respect the Circuit Court gave greater emphasis to §1692n than the District Court but held that it was not a *carte blanche* grant to the states to pass laws which would make the business of multi-state debt collection agencies impossible. Allied claims that this ruling is in conflict with this Court's decision in *New England Power Co. v. New Hampshire, supra.*

In *New England Power* the Court held that a New Hampshire statute which allowed the state to prohibit the transmission of hydroelectric power out of the state if it was needed in New Hampshire was protectionist legislation which violated the Commerce Clause. In addition, the Court held that the "savings clause" of the Federal Power Act (cited 102 S.Ct. at 1101) which merely provided that the states retained such "lawful authority" as they had exercised over the exportation of hydroelectric energy was in no sense an affirmative grant of authority to burden interstate commerce.

The present case is again distinguishable for two reasons. First, there is no claim that the regulatory scheme here is protectionist or burdensome. Second, 15 U.S.C. §1692n authorizes the states to pass *stricter* laws for the protection of consumer debtors making it distinctly different than the savings clause at issue in *New England Power.* In any case, Allied's argument avoids the major issue; for however one views §1692n, it is, at the least, a clear Congressional statement of

the need for state regulation which makes this case very different from the situation presented in *Allenberg*, or any of the other cases cited by Allied.

B. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Allied claims it was error for the Circuit Court to fail to remand this case to the District Court for a fuller showing of the burdens imposed by possible multi-state regulation. As we pointed out in the courts below, however, this issue is completely hypothetical. Indeed, Allied states in its brief to this Court that it ". . . has never been required to obtain a license in order to conduct its business with respect to debtors located in any other state, and has no such licenses." (P.Brief, 5). This Court has stated that it will not decide hypothetical questions in advance of the necessity for decision. *Thorp v. Housing Authority of the City of Durham*, 393 U.S. 268, 284 (1968).

C. THERE IS NO IMPORTANT ISSUE REQUIRING SETTLEMENT BY THIS COURT

This case was decided on the basis of its facts applying this Court's test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The conclusion was that the state regulatory scheme for consumer debt collectors did not discriminate against out-of-state agencies, produced only minimal burdens on interstate commerce, and was supported by an overwhelming state interest in protecting its consumer debtors. At a minimum the legitimacy of this state interest was recognized by Congress. There has been no harm to Allied and no national interest has been offended by the challenged Connecticut statute. Accordingly, there is no necessity for action by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 1983, I served a copy of the foregoing brief by mailing, postage prepaid, to the following:

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